

M E M O R I A L

F O R

Isabel Macneil, relict of Neil Campbell of Dunstaffnage, and Lillias and Margaret Campbells, their daughters, defenders,

A G A I N S T

Colin Campbell of Ederline, trustee for Angus Campbell now of Dunstaffnage, pursuer.

THIS pursuer, as trustee for Angus Campbell, now of Dunstaffnage, is insisting, before your Lordships, in a reduction of certain additional provisions, granted by Neil Campbell late of Dunstaffnage, father to the said Angus, in favour of the defenders, upon these grounds: That the said provisions are in themselves highly irrational, considering the circumstances of the estate; and that they were granted *in fraudem* of obligations which the said Neil had come under in his son Angus's contract of marriage.

This cause having been very lately before your Lordships, it will only be necessary at present to resume very shortly the facts which have given rise to it.

Neil Campbell, late of Dunstaffnage, intermarried with Isabel Macneil, one of the defenders, and daughter of Malcolm Macneil of Colonsay; and in his marriage-contract, of
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Sept. 27 1727 this date, he became bound to provide her in an annuity of 500 merks, in the event of her surviving him, and likewise in the half of the free moveables, and of the conquest that should be made during the marriage. The tocher he received was 6000 merks.

This contract or minute of agreement having been drawn in a very inaccurate form, a few months thereafter a deed
June 20. 1728. was executed by the said Neil Campbell, in a more regular form, and proceeding upon the narrative of the former minute; wherein, besides the annuity of 500 merks, he became bound to provide to his said spouse all and whatsoever lands, heritages, &c. that should be conquest or acquired by him, or which should fall and pertain to him, during the course of the marriage.

Apr. 30. 1751. Angus Campbell, the only son of this marriage, intermarried with Margaret Campbell, daughter of the deceased Dougal Campbell of Ederline; and in the marriage-contract the said Neil Campbell, the father, *inter alia*, became bound "to settle and provide his estate of Dunstaffnage to himself in liferent, and after his decease, to and in favour of the said Angus Campbell, his son, in liferent; and the fee of the same, after both their deceases, to the heir-male of the said Angus Campbell's body." And likewise the said Neil Campbell restricted himself from burdening the said estate with any more or other debts than what he presently owes, and such provisions as he may make to his children already procreate, or to be procreated of his body.

By virtue of the powers reserved to him in this contract,
Feb. 17. 1752. the said Neil Campbell, of this date, executed a bond of provision in favour of his two daughters, the memorialists; obliging himself to pay 4000 merks to Lillias Campbell, the oldest, and 3000 merks to Margaret Campbell, the youngest; and in the event that there should be no heirs-male left of his body, he became bound to augment the provision of the oldest to 6000 merks, and that of the youngest to 4000 merks; with

with power to himself to diminish the same in case an heir-male should exist of his own body, and to augment them failing heirs-male of his own body.

Angus Campbell, son to the said Neil Campbell, had, at the time of granting this bond of provision, two sons of his above-mentioned marriage with Margaret Campbell; but both these having soon after died, Angus Campbell himself having also fallen into such an unhappy situation, as to cut off all hopes of any further issue of his body, Neil Campbell the father judged it then proper to augment the provisions he had made to his two daughters, and to make a provision to his wife suitable to this new situation of his family. For which purpose, he executed a bond, of this date; where-Jan. 25. 1758. by he provided his said spouse, in case there should be no heirs-male existing of his own body, or of the body of Angus Campbell his son, to an additional jointure of 200 merks Scots; and in case of such heir-male existing, to an additional jointure of 100 merks, over and above the annuity provided to her by her contract of marriage. And by the same deed he also provides his spouse, in case of her survivance, to the sum of 1200 merks, and of a jointure-house to be built to her to the value of 1200 merks also; together with several other particulars of less importance. By the same deed, the provisions payable to his two daughters are fixed to pretty near the same sum to which they were intitled by the former bond of provision in 1752.

Neil Campbell perceiving it to be every day more and more improbable that his son Angus would have any issue, judged it proper further to augment his daughters provisions; and accordingly, of this date, he executed another bond,Oct. 7. 1761. wherein he confirms the provisions in favours of his wife, in pretty nearly the same terms as formerly; but at the same time augments the provisions to his two daughters to the sum of L. 400 Sterling each, in case there should be no heirs-male

male of his own or his son's body, and to the sum of L. 250 if such heir-male should exist.

This action has been brought at the instance of Colin Campbell of Ederline, as trustee for the said Angus Campbell, for the purpose of reducing the several provisions granted to his mother by the said Neil Campbell, in his several deeds executed in her favour, and of the additional provisions granted to Lillias and Margaret Campbells, sisters to the said Angus Campbell, in 1761.

The several points in this cause having been reported to your Lordships by Lord Pitfour, you were pleased, of this
Jan. 14. 1766. date, to pronounce the following interlocutor: "On report
" of the Lord Pitfour, the Lords repel the objections to the
" pursuer's titles; and find, that the fee of the lands was in
" the father, and after his death, in the son; and remit to
" the Lord Ordinary to hear parties procurators further on
" the value of the estate, and extent of the debts affecting
" the same; and to do therein as he shall see cause."

The cause having accordingly been inrolled before the Lord
Pitfour Ordinary, in consequence of this remit, his Lordship,
Jan. 24. 1766. by interlocutor of this date, "ordained the pursuer to give
" in, betwixt and that day se'ennight, a condescendence of
" the tacks upon the estate; and ordained the defenders to
" give in, betwixt and that day fortnight, their objections
" to the list of debts, and a condescendence of what they
" say is the rental and value of the estate."

In obedience to this interlocutor, the defenders did state particular objections to the list of debts given in by the pursuer, and said to have been due by the late Dunstaffnage at the time of his death; setting forth, that this account was in many respects extremely erroneous.

Accordingly the pursuer, alongst with his answers to these objections, thought it adviseable to give in a new scheme of the debts, where the errors, at least in point of form, were
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corrected, and the account itself adjusted, according to the rules commonly used in cases of that nature.

Thereafter the defenders gave in, agreeable to his Lordship's appointment, a condescendence of what they imagined to be the value of the estate; and at the same time, in support thereof, produced a letter from Alexander Macneil of Orenfay, brother-german to Lady Dunstaffnage, offering either to take a tack of these lands, at the yearly rent of L. 300 Sterling, or to purchase them at the price of L. 10,000 Sterling. Matters being thus far advanced, the Lord Ordinary, upon a minute of debate, "made avisandum to your Lordships; and appointed memorials to be given in on both sides." Feb. 14. 1766.

It will be unnecessary here to enter at all upon the arguments in point of law which were urged at full length in the former informations. The subject of the present inquiry is, How far the provisions granted by the late Dunstaffnage to his wife and his two daughters, the memorialists, are to be regarded as rational, and agreeable to the situation of his circumstances at that time.

And with regard to the list of debts, the defenders might with some reason insist to have the grounds of these debts produced; but as that would be attended with delay and expence, the defenders are willing to admit the evidence now produced sufficient in the present state of the process. They must however object to two articles which make a part of that list; to wit, an annuity of L. 5 : 11 : 1, said to be due to Archibald Campbell's widow; of which there is no evidence or voucher produced. The other article is the provision to the present Dunstaffnage's daughters, which the pursuer cannot be allowed to state as a debt to exhaust the value of the estate belonging to Angus Campbell.

Neil Campbell, in his son Angus's contract of marriage, became bound to pay to the daughters of that marriage, in case there should be no heirs-male, the sum of L. 500 Sterling, payable

able when they should attain the age of eighteen. This sum has not yet become due ; and though it had, the memorialists apprehend, that neither Angus Campbell, or his trustee, the pursuer, can be allowed to state this provision due to his own daughters amongst the list of debts founded upon, in order to shew that the provisions under reduction are highly irrational, the estate having beforehand been so much burdened, as to leave Angus Campbell the heir nothing more than a very scanty subsistence. Had no such provisions been granted to his two daughters, Angus Campbell would nevertheless have been obliged to maintain and support them. The interest of these provisions, whenever they shall become due, which will not happen for several years, will no doubt be applied to pay that maintenance. Angus Campbell might almost as well be allowed, in this shape of the argument, to state as a debt burdening the estate, the annuity of L. 50 due to himself, which his father Neil Campbell became bound, in the same marriage-contract, to pay to him during the subsistence of the marriage.

But allowing that the scheme of debts given in by the pursuer shall be held in all respects to be proper and well founded, yet the memorialists do not see that these debts are sufficient to make out the pursuer's plea, *viz.* That in the circumstances of the late Neil Campbell, the provisions granted by him to the memorialists, his wife and daughters, are irrational and extravagant ; and that unless they are set aside, the estate would be so burdened, as not to leave any fund or subsistence for Angus Campbell himself. Your Lordships will be informed, that the whole amount of the debts which the pursuer has been able to muster up, even taking in the provisions due to the daughters of Angus Campbell himself, is L. 3801 Sterling. The memorialists have produced, before the Lord Ordinary, a missive, signed by Alexander Macneil of Orensay, wherein he offers to purchase the estate of Dunstaffnage at the sum of L. 10,000 Sterling, and to find undoubted security for payment of this price.

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Upon the supposition, therefore, that this offer of Mr Macneil's was to be accepted of, Angus Campbell, after payment of the whole provisions granted to the memorialists, and after having fairly provided for his own two daughters by the L. 500 due to them, which is contained in the list of debts, will have a clear reversion to himself of upwards of L. 6000 Sterling.

Neither can it be regarded as any hardship upon Angus Campbell, that, in this event, he would be obliged to quit his paternal inheritance. Angus Campbell has no children except his two daughters. His wife is dead; and he himself, for some years past, has been struck with a palsy, which renders it next to impossible that he should have any further issue of a second marriage; at his death, therefore, the estate of Dunstaffnage would descend to the heir-male, who happens, in this case, to be only connected with him in a very distant degree.

And even although Angus Campbell is still to retain possession of this estate, the memorialists do not see, that it would be so overburdened as not to yield him a sufficient maintenance. Mr Macneil, in the same letter, has offered to take a thirty-eight years lease of the estate, at the rent of L. 300 *per annum*. The interest of the debts, even when calculated at the rate of L. 5 *per cent.* which very probably is not the case with all of them, is about L. 184. The pursuer, in his scheme, makes it to be L. 190: but here there appears to be a little mistake. The sum total of the debts is made to be L. 3801; and if all that sum bore interest, that interest would amount to L. 190:1:3: but it appears from the state itself, that of this principal sum there is about L. 126 made up of bygone annualrents, &c. which bear no interest. If to this interest of L. 184, there is added the annualrent of the several provisions now under reduction, the whole annual burdens on the estate will amount to about L. 264: So that, upon setting a tack at the offered rent of L. 300, there will remain to Angus Campbell himself, besides the L. 25 yearly payable to his daughters, as the interest of their provisions, an income of L. 36 yearly; and upon the death
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of his mother, the memorialist, who is about 60 years of age, he will have an additional income of about L. 40 Sterling. This income, however small, it is believed, might be sufficient, seeing his daughters are already supposed to be provided for, to supply Angus Campbell himself in the few comforts of this life which a person in his unhappy situation is able to enjoy. The provision to his two daughters of L. 500 is not yet fallen due, and very probably, before it become payable, the additional income, by the death of his mother, will have accrued to him.

But, at any rate, as it is so easy for him to get the better of those his straitening circumstances, by disposing of his estate at the price that has been offered, your Lordships surely will not allow him to found upon that incumbered situation as an argument in the present case, and to indulge his humour of keeping up a family-estate, for the sake of a remote heir, when his doing so must have the effect of setting aside provisions which, if considered by themselves, cannot surely be regarded as extravagant for the wife and children of a gentleman.

In respect whereof, &c.

HENRY DUNDAS.

